what is "the general run of assessments" in this country.

With regard to the appellant's contention that the award in the present case is so low that it should be varied by this Court I am certainly not prepared to say in the words of Greer L.J. in the case of *Flint* v. *Lovell* [12]:—

"Either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it..... an entirely erroneous estimate of the damage to which the plaintiff is entitled."

Nor do I feel any disposition to say to myself: "Good gracious me — as low as that." (See *McCarthy* v. *Coldair, Ltd.* [13]).

For myself I see very little wrong with the award as a whole, though I do not altogether agree with the processes by which the trial Judge arrived at it. Indeed, in my view, if it errs at all it errs in the direction of being too generous. There is no doubt that for the rest of his life he is going to suffer inconvenience and embarrassment. There is no doubt that he will probably have to abandon his occupation as a rubber tapper and indeed, so far as it depends on his inherent physical and mental abilities, his earning capacity may well be considerably less in the future than it has been in the past. On the other hand, he is a young man and for a young man living in the social and economic circumstances in which he finds himself $25,000 will set him up very comfortably in life. He has been engaged in rubber cultivation and if he cares to invest even a portion of his damages in rubber land he can go on living the life to which he has been accustomed subject to the two exceptions that his income will be considerably higher than it has been in the past and that his labours will be considerably less arduous. What more the defendants can be required to do to make good the consequences of their wrong it is difficult to think.

All that, however, is beside the point. As was said by Morris L.J., in the case of *Scott* v. *Musical* [14]:—

"It is recognised that the fixation of damages is so largely a matter of opinion or of impression that differences of calculation or assessment are to be expected. There is, to some extent, an exercise of judicial discretion. It is for this reason that, if three Judges of the Court of Appeal consider that the amount of general damages that they would have awarded would have been a figure different from that decided by the trial Judge, they will not, for that reason alone, give preference to their own figure; they will only do so if satisfied that the Judge has acted on a wrong principle of law or has misapprehended the facts, or has, for those or other reasons, made a wholly erroneous estimate of the damage suffered."

Whether or not I am right in thinking that the award made by Hepworth J. is on the whole a satisfactory one having regard to all the circumstances of the case, I am certainly satisfied that I am right in saying that it is not "a wholly erroneous estimate of the damage suffered."

I would dismiss the appeal with costs.

Hill J.A.: I have had the advantage of reading the judgment of the learned Chief Justice, with which I agree and have nothing to add.

Good J.A.: I have had the advantage of reading the judgment of the learned Chief Justice with which I am in complete agreement. I really have nothing to add to it, but I feel impelled to record my express agreement with what he has said on the subject of referring to the damages awarded in English and Scottish cases in relation to the assessment of damages in this country. The practice of holding a sort of auction based on the sums which have been awarded in England and Scotland is not necessarily conducive to arriving at the right result, or even a fair result, in local conditions here.

I too would dismiss this cross-appeal with costs.

Appeal dismissed.

Solicitors: *Bannon & Bailey; Murphy & Dunbar; Shook Lin & Bok.*

CHEE KIM SENG & ANOR. v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Good JJ.A.) October 16, 1961]

[K.L. — F.M. Criminal Appeal No. 18 of 1961]

Criminal Law and Procedure — Murder — Penal Code, s.300 — Defence of accident — Direction to jury — Possibility of culpable homicide not amounting to murder not put to jury.

The appellants were charged with murder of a fishmonger on a street in broad daylight and the first appellant was convicted of this offence and sentenced to death. The second appellant was convicted of culpable homicide not amounting to murder and sentenced to six years' imprisonment. The first appellant had pleaded accident in his defence and that was the only defence put forward. In his summing-up to the jury, the learned trial Judge put the matter as a case of murder or of no offence at all.

Held: the learned trial Judge erred in putting the matter to the jury in this form. The evidence could be viewed as giving rise to an offence less than murder though still culpable, and even though the defence did not rely on any other ground than the one of accident, possible defences which would have reduced the offence from one of murder to one of culpable homicide not amounting to murder should have been put to the jury.

Cases referred to:—

(1) *Lumley* 22 Cox C.C. 635.
(2) *Director of Public Prosecutions* v. *Smith* [1960] 3 All E.R. 161.
(3) *R.* v. *Hopper* [1915] 2 K.B. 431, 435.
(4) *Mancini* v. *Director of Public Prosecutions* [1942] A.C. 1.
(5) *Kwaku Mensah* v. *The King* [1946] A.C. 83, 93.

COURT OF APPEAL.

L. P. Thean for the 1st appellant.

M. W. Maxwell for the 2nd appellant.

Syed Othman bin Ali (Deputy Public Prosecutor) for the respondent.

Thomson C.J.: These two appellants were charged at the Muar Assizes with the murder of

one Neoh Thian Huat near Muar on 26th February, 1961. The first appellant was convicted of murder and sentenced to death. The second appellant was convicted of culpable homicide not amounting to murder and sentenced to six years' imprisonment.

Both appellants appealed against their convictions and the second appellant also appealed against his sentence. On 15th August we allowed the appeal of the first appellant; we set aside his conviction for murder; we imposed in place of it a conviction for culpable homicide not amounting to murder and we sentenced him to ten years' imprisonment. The appeal of the second appellant was dismissed.

The deceased, who was a fish-monger, was stabbed to death on the Bakri Road leading out of Muar in broad daylight on 26th February. There was one stab wound, the fatal wound, in the front of his chest penetrating into the lung and two superficial stab wounds on the back, close to the left shoulder-blade. It was common ground that the first appellant, who had had an altercation with the deceased a day or two previously arising out of a collision between the deceased's goods tricycle in which he carried his fish and the appellant's trishaw, was in some way connected with the stabbing.

It was the prosecution case that both appellants, who are brothers, lay in wait for the deceased and that while the second appellant held him the first appellant stabbed him to death.

The case for the first appellant was that he met the deceased as it were accidentally on 26th February and they had words about the incident the previous day. Words led to blows and in the course of the fight the appellant was joined by two friends, not including the second appellant, and the deceased ran away. They pursued him and when they overtook him the deceased drew a knife from his pocket and attempted to stab them. The fight continued and in the course of it the deceased was stabbed, although the appellant did not know how it happened. On this the case was put to the jury by counsel as one of accident.

The case for the second appellant was that he happened to be standing nearby when the incident occurred, that it happened very much as the first appellant described it, but that he himself took no part in it.

I do not think we are concerned with the details of the evidence, but it is necessary to consider the way in which the matter was put to the jury by the trial Judge.

Before us this was subjected to considerable criticism, some of which unfortunately was justified. In particular, much was made of the following passage:—

> "Culpable homicide is the killing without excuse of a human being. Culpable homicide is murder if and only if at the time the person who commits the act resulting in the death of the deceased he did that act either with the intention of killing or with the intention of inflicting such bodily injury on that person as is likely to cause death to that person. I will repeat that murder is only murder if at the time of doing the act a person who does the act causing death of the deceased either with the intention of causing death or with the intention of causing such bodily injury which in the normal course of nature would cause death to the person upon whom the injury is inflicted. Culpable homicide is not murder but amounts to the offence of culpable homicide not amounting to murder commonly known as manslaughter if at the time the culpable homicide is committed the person doing the act did it with the knowledge that such act was likely to cause death. Now, Members of the Jury, as far as the offence of murder is concerned the most important matter for you to consider is the state of mind of the accused at the time the act was committed. If at the time the act was committed there was intention to kill or cause grievous bodily injury likely to cause death of the person injured it is murder; if it is merely done with the knowledge that it is likely to kill, it is manslaughter."

Quite frankly that passage is not very accurate nor are its terms calculated to illuminate the minds of a jury to any great extent.

We appreciate that it is no easy task to exegesise the whole of the definition of murder as contained in sections 299 and 300 of the Penal Code. On the other hand it is seldom necessary to do so. If, however, an attempt is made it should be made correctly and what section 300 says is not that there must be an intention to cause "grievous bodily injury likely to cause death" but that there must be an intention to cause bodily injury which is either "such.....as the offender knows to be likely to cause.....death" or such as is "sufficient in the ordinary course of nature to cause death."

Here we would pause to observe that, when at a later stage in his charge the learned Judge referred to the case of *Lumley* [1] to emphasise the point that what would be in the contemplation of a reasonable man is a consideration relevant to the question of intention, it is unfortunate that he quoted the whole of the following passage from the summing-up of Avery J.:—

> "When he did the act, did he contemplate, or must he as a reasonable man have contemplated, that death was likely to result, or must he as a reasonable man have contemplated that grievous bodily harm was likely to result? If, in your opinion, he must as a reasonable man have contemplated either of those consequences, then your duty is to find him guilty of murder."

Even when the expression "grievous bodily harm" is considered in the light of what was said in the case of *Director of Public Prosecutions* v. *Smith* [2] the second limb of that proposition is not in accordance with the definition of murder contained in sections 299 and 300 of the Penal Code and to quote it was calculated to mislead the jury particularly if they considered it together with what had been said earlier.

In the majority of cases, of course, it is sufficient to say, to begin with, that murder is deliberate killing. In the class of cases which can be properly described as murder or nothing the nature of the fatal injuries is generally such as to raise a presumption that there was an intention to kill and the only question to be decided is whether or not the accused inflicted these injuries. In the other common type of case there is seldom any question as to who

inflicted the injuries; the vital question to be decided is whether for some reason or other the killing is wholly excusable or amounts to something less than murder. Here, generally, the question is not whether it falls or does not fall within the substantive portion of section 300, but whether it falls within one or other of the special exceptions set out later in that section.

And that brings me to the main reason for which we considered the summing-up in the present case was unsatisfactory in the case of the first appellant. It is true that the actual defence put forward and relied on at the time was that the killing was an accident. If that was accepted that was the end of the matter and he was entitled to be acquitted. But if it was not accepted it by no means followed that the killing amounted to murder. In the event the trial Judge put the matter to the jury as a case of murder or nothing and in our opinion in doing so he was wrong.

Without going into detail it is clear there were several possible ways in which the evidence might have been viewed. It could have been regarded as making out a deliberate lying in wait followed by a deliberate killing and in that case, of course, the appellant was guilty of murder. On the other hand, it could have been, though perhaps with difficulty, regarded in the light of the submission of counsel for the defence as something which had happened accidentally and in that case there was no offence committed at all. It could also, however, have been regarded in such a way as to make out a case of manslaughter either because the appellant had been defending himself against attack but had gone beyond the limits of the right of private defence or because a sudden fight had arisen and the appellant had killed the deceased without premeditation and without having taken undue advantage or acted in a cruel or unusual manner.

In our view those possible defences that the killing was something less than murder though still culpable should have been left to the jury even though they were not relied on by defending counsel. As was said by Lord Reading C.J., in the case of *R.* v. *Hopper* [3]:—

> "Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the Judge to put such questions as appear to him properly to arise upon the evidence even although counsel may not have raised some question himself."

This rule was approved by the House of Lords in *Mancini* v. *Director of Public Prosecutions* [4] and the reason for it was thus stated by Lord Goddard in the case of *Kwaku Mensah* v. *The King* [5]:—

> "The reason for the rule is that on an indictment for murder it is open to a jury to find a verdict of either murder or manslaughter, but the onus is always on the prosecution to prove that the offence amounts to murder if that verdict is sought. If on the whole of the evidence there is nothing which could entitle a jury to return the lesser verdict the Judge is not bound to leave it to them to find murder or manslaughter. But if there is any such evidence then, whether the defence have relied on it or not, the Judge must bring it to the attention of the jury, because if they accept it or are left in doubt about it the prosecution have not proved affirmatively a case of murder."

We were unable to say what course the jury would have taken in the case of the first appellant had they been properly directed. In the circumstances we thought it proper to set aside the conviction for murder and substitute for it a conviction for culpable homicide not amounting to murder and to impose what we considered a suitable sentence.

In the case of the second appellant the trial Judge did leave the question of culpable homicide not amounting to murder to the jury and the jury brought in a verdict of guilty of that offence. In his case such minor errors as there were in the summing-up were errors in favour of the defence and we saw no reason to interfere with either the conviction or the sentence.

Order accordingly.

Solicitors: *Shook Lin & Bok; P. T. Wong & Co.*

JUBRI v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Good JJ.A.) October 16, 1961]

[K.L. — F.M. Criminal Appeal No. 20 of 1961]

Evidence — Circumstantial evidence — Securing conviction on.

The appellant was convicted for murder of a woman and sentenced to death. The prosecution case was supported by circumstantial evidence showing that (a) the appellant was on visiting terms with the deceased and must have known that she was a woman of some substance; (b) shortly before the killing the appellant had been short of money; (c) appellant had ten days before the killing proposed to a prosecution witness to rob the deceased and (d) there was no evidence to support the appellant's contention that he was alone at his house on the day in question. On appeal,

Held: in order to secure a conviction on circumstantial evidence, the evidence must be such that if it is believed, there is no reasonable alternative to the guilt of the accused. Having regard to the evidence, the verdict of the jury cannot be supported in this case. *Kartar Singh & Anor.* v. *R.* [2] followed.

Cases referred to:—

(1) *Wallace* 23 Cr. A.R. 32, 35.

(2) *Kartar Singh & Anor.* v. *R.* [1952] M.L.J. 85, 86.

COURT OF APPEAL.

S. Y. Chan for the appellant.

B. T. H. Lee (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Thomson C.J.: This appellant was convicted for murder at the Muar Assizes and sentenced to death. He appealed against his conviction and in the event we set it aside on 16th August, 1961.

The charge against the appellant was that during the night of 27th/28th March, 1961, at Parit Puasa near Batu Pahat he murdered a woman Andai binti Kardi.